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August 8, 1997

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 200
Washington, D.C. 20554

Re: Access Charge Reform, CC Docket No. 96-262

Dear Mr. Caton:

I am enclosing the original and 4 copies of the WorldCom, Inc. Comments in Opposition to NYNEX Petition for Stay Pending Judicial Review in the referenced proceeding.

Please return a date-stamped copy of the enclosed (copy provided).

Respectfully submitted,

David Sieradzki

David L. Sieradzki
Counsel for WorldCom, Inc.

Enclosures
cc: Service List

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AUG 08 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Access Charge Reform

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)
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CC Docket No. 96-262

WORLDCOM, INC. COMMENTS IN OPPOSITION TO
NYNEX PETITION FOR STAY PENDING JUDICIAL REVIEW

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Counsel for WorldCom, Inc.

Dated: August 8, 1997

SUMMARY

NYNEX has met none of the criteria that the Commission and the courts use for determining whether to impose a stay. First, NYNEX is not likely to prevail on the merits of its challenge to the TIC rule, because the rule is substantively sound, advances access and full-service competition, and is the only possible result consistent with the “market based” approach to access reform that the Commission adopted (and which NYNEX advocated). Moreover, the adoption of the new TIC rule was procedurally sufficient because the rule was anticipated by, and a “logical outgrowth” of, the *Notice* in this proceeding, as demonstrated by the arguments of several parties, including WorldCom, for a similar approach.

Second, neither NYNEX nor other ILECs is likely to suffer any type of legally cognizable harm in the absence of a stay. Third, a stay would inflict severe damage on competitive carriers, their customers, and the pro-consumer, competitive framework envisioned by the Commission in adopting the *Access Reform Order*. Finally, the rule powerfully advances the Commission’s public interest goal of competition in the interstate access market, and a stay would impede the public interest by interfering with access and full-service competition.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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**WORLDCOM, INC. COMMENTS IN OPPOSITION TO
NYNEX PETITION FOR STAY PENDING JUDICIAL REVIEW**

WorldCom, Inc. ("WorldCom"), by its attorneys, hereby opposes the Petition for Stay Pending Judicial Review filed by NYNEX on July 23, 1997.

NYNEX seeks a stay of the rule adopted in the *Access Reform Order* 1/ that allows incumbent local exchange carriers ("ILECs") to assess the per-minute residual transport interconnection charge ("TIC") only upon their own transport customers, and not upon parties that purchase transport from competitive carriers rather than the ILECs. Although WorldCom has sought reconsideration of a number of the decisions in the *Access Reform Order* affecting transport and the transport interconnection charge, 2/ we strongly support this aspect of the Commission's TIC rule, which is one of the soundest and most pro-competitive elements of the *Order*.

1/ *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, FCC 97-158 (released May 16, 1997) ("*Access Reform Order*" or "*Order*").

2/ Petition for Reconsideration of the First Report and Order of WorldCom, Inc., *Access Charge Reform*, CC Docket No. 96-262 (filed July 11, 1997).

NYNEX has met none of the criteria that the Commission and the courts use for determining whether to impose a stay. 3/ First, NYNEX is not likely to prevail on the merits of its challenge to the TIC rule, because the rule is substantively sound, and is the only possible result consistent with the “market based” approach to access reform that the Commission adopted (and which NYNEX advocated). In fact, the preexisting rule, which allowed ILECs to recover transport revenues from customers that did not use ILEC transport, was substantively deficient and was one of the causes of the reversal, in *CompTel v. FCC*, of the original Commission decision establishing the TIC. 4/ Moreover, the adoption of the new TIC rule was procedurally sufficient because the rule was anticipated by, and a “logical outgrowth” of, the *Notice* in this proceeding, 5/ as demonstrated by the arguments of several parties, including WorldCom, for a similar approach.

Second, neither NYNEX nor other ILECs is likely to suffer any type of legally cognizable harm in the absence of a stay. Third, a stay would inflict severe damage on competitive carriers, their customers, and the pro-consumer, competitive framework envisioned by the Commission in adopting the *Access Reform Order*. Finally, the rule powerfully advances the Commission’s public interest goal of

3/ *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

4/ *Competitive Telecommunications Ass’n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996) (“*CompTel v. FCC*”).

5/ *Access Charge Reform*, CC Docket No. 96-262, Notice of Proposed Rulemaking, FCC 96-488 (released Dec. 24, 1996) (“*Notice*”).

competition in the interstate access market, and a stay would impede the public interest by interfering with access competition. These arguments are discussed in greater detail below.

I. THE COMMISSION IS LIKELY TO PREVAIL ON THE MERITS BECAUSE THE TIC RULE IS SUBSTANTIVELY SOUND AND WAS ADOPTED UPON AMPLE NOTICE.

A. The TIC Rule is Reasonable and Consistent With the Commission's Pro-Competitive Policies.

Contrary to NYNEX's assertions, the rule allowing ILECs to apply the per-minute residual transport interconnection charge only to their own transport customers, and not to customers of competitors' transport service, is substantively sound. First, the rule facilitates competition in interstate access markets; indeed, it is the only approach that is consistent with the Commission's overall "market based" approach to access reform. Second, the rule requiring that only ILEC transport customers pay this essentially transport-related charge is consistent with the Commission's determinations regarding the nature of the revenues recovered through the TIC. Finally, none of NYNEX's other substantive arguments against the rule's validity have any merit.

1. The TIC Rule Promotes Competition and Is The Only Approach Consistent With Market-Based Access Reform.

The Commission's rule exposing all transport revenues to transport competition is consistent with the Commission's overall "market based" approach to access reform, which WorldCom strongly supports. To make a "market-based" approach to access reform work, the Commission must ensure that "every access

revenue stream of the incumbent LECs must be subject to at least the threat of competition in a post-1996 Act world.” ^{6/} This is the only way to create a more competitive access and full-service environment in which market forces eventually have the chance to drive access rates down.

The Commission correctly ended the ILECs’ practice of imposing per-minute transport interconnection charges upon competitors’ transport customers. This practice inhibited competition for three reasons: First, it made it easier for ILECs to underprice their own transport services *vis a vis* local competitors, because revenue associated with the transport element could be recovered through a charge that would be subject to much less competition. Second, given the very limited extent of competition for local switching to date, the imposition of the transport interconnection charge on customers using ILEC local switching but not ILEC transport unfairly guaranteed a revenue stream to ILECs that was not available to their competitors. Third, this practice essentially resulted in small, nascent competitive entrants transferring revenues to which they might have had access to their largest competitors, the incumbent LECs. The new rule adopted in the access order rectifies these problems.

Transport is much more likely to be subject to competitive pressure than local switching. To maximize the competitive pressure on the residual TIC and to use market forces to drive down that problematic charge, it makes sense to

^{6/} WorldCom Initial Comments, *Access Charge Reform*, CC Docket No. 96-262, at 22 (filed Jan. 29, 1997).

associate that charge with transport (*i.e.*, require ILEC transport users to pay it) rather than with local switching (*i.e.*, allow ILECs to recover the charge even from customers that use their local switching but not their transport services).

2. Requiring That Only ILEC Transport Customers Pay The TIC Is Consistent With The Commission's Determinations Regarding The Nature Of The Revenues Recovered Through This Essentially Transport-Related Charge.

As NYNEX concedes, the TIC is essentially a transport-related charge.

Four years ago, when the Commission established restructured rates for transport facilities "that would not produce revenues equal to the revenues from the previous Local Transport rates[,] [t]he TIC was created to recover the difference so that the LECs could continue to recover the costs that had been assigned to the Local Transport category." ^{7/} As a result, it is only logical to require that this ILEC transport interconnection charge be paid by purchasers of ILEC transport. This approach is clearly superior to the Commission's previous policy, in which parties were required to pay the transport interconnection charge even if they did not use ILEC transport.

There is no merit to NYNEX's argument that the new rule is inconsistent with the Commission's findings about the LECs' right to recover residual TIC dollars. If, as NYNEX contends, the true nature of costs in the TIC is somehow unquantifiable and unknowable -- even though, as NYNEX must concede, those revenues can be traced to costs allocated to local transport -- then the

^{7/} NYNEX Petition at 3.

Commission would be justified to eliminate those dollars from access charges. The Commission chose not to disallow these costs. However, the Commission sensibly placed the burden on the ILECs to recover, or not recover, those revenues from their own customers for relatively competitive services, rather than giving them an entitlement to recover such revenues from captive monopoly ratepayers.

Even assuming that, as NYNEX argues, the per minute residual TIC will recover some “service-based costs” (*i.e.*, costs of tandem-switched transport) -- a proposition with which WorldCom vehemently disagrees -- there is no reason that such subsidies should be paid by the customers of competitive carriers. The ILECs’ access charges have long been riddled with implicit cross-subsidies among customers and among services. The *Order* only partly corrected this situation. There is no reason now to make the situation worse by imposing such cross-subsidy burdens, which according to NYNEX’s argument relate primarily to ILEC transport services, upon customers who do not purchase ILEC transport. This would be profoundly anti-competitive.

Moreover, the Commission is likely to prevail on the merits of this rule in light of the decision of the *CompTel v. FCC* panel reversing and remanding the original transport interconnection charge. One of the principal reasons for that reversal was the application of such non-cost based charges to customers that have nothing to do with the costs recovered through the charge. 8/ If the Commission had continued to allow ILECs to recover this transport-related charge from parties

8/ *Id.*, 87 F.3d at 532.

that do not purchase ILEC transport, it would have violated this aspect of the *CompTel v. FCC* remand order.

3. NYNEX's Other Substantive Arguments Against The Rule Are Without Merit.

There is no merit to NYNEX's argument that the new TIC rule will have an unreasonably disproportionate effect on NYNEX. ^{9/} The rule has a disproportionate effect on NYNEX only because NYNEX's transport interconnection charge is disproportionately high by comparison with other ILECs, and because NYNEX is only able to provide an explanation for the so-called "service related" portion of a relatively low proportion of its charge. NYNEX could remedy this problem easily by unilaterally reducing its transport interconnection charge, as the price cap rules permit it to do. ^{10/}

^{9/} NYNEX Petition at 13.

^{10/} At several points in its petition, NYNEX apparently assumes that, notwithstanding the Commission's rules, it can continue to selectively reduce its transport interconnection charge by different amounts in LATA 132 and in other parts of its service area, pursuant to the waiver granted in *NYNEX Telephone Companies Petition for Waiver*, 10 FCC Rcd 7445 (1995) ("*USPP Waiver Order*"). See, e.g., NYNEX Petition at 7 & n.21, 17, 21. But it is by no means clear that this is the case. The May 1997 *Access Reform* and *Universal Service* orders appear to contradict or supersede the *USPP Waiver Order* in a number of respects. For example, the competitively neutral universal service recovery mechanism adopted in the *Universal Service Order* appears to contradict, and supersede, the *USPP Waiver Order*'s decision to allow recovery of long term support ("LTS") revenues through a bulk-billed charge to IXCs based on the relative percentages of their revenues in NYNEX region. And the adoption of presubscribed interexchange carrier charges ("PICCs") in the *Access Reform Order* appears to supersede the waiver allowing NYNEX to recover CCL revenues through PICCs in the *USPP Waiver Order*. The Commission should clarify whether and to what extent the *USPP Waiver Order* has any continuing vitality in the wake of the comprehensive reforms adopted in May 1997.

Similarly, NYNEX's argument that the rule will have arbitrary effects due to the way that the price cap rules operate 11/ is baseless. The price cap regime, for which NYNEX and all the other Bell companies have lobbied vociferously over the years, generally works to the ILECs' advantage by giving them the benefit of demand growth for access traffic despite the fact that (given the ILECs historical virtual monopoly over access service) such demand growth has been due primarily to the marketing efforts of long distance carriers. Yet NYNEX has the audacity to complain that it might receive less revenues than expected because of the possibility that demand for its services might shrink! NYNEX cannot have it both ways. The demand changes of which NYNEX complains are a fact of life under the price cap rules.

Moreover, given the increasing competitive opportunities for transport service, NYNEX has the ability -- and the proper incentive, under the Commission's access reform and price cap rules -- to try to retain transport customers by cutting its rates and undertaking other measures to make its transport services appealing. Under these circumstances, there is no basis for NYNEX's lament about the operation of the price cap rules. The access and price cap rules give NYNEX and other ILECs no entitlement to any particular amount of revenues, whether through the residual transport interconnection charge or any other rate element.

11/ NYNEX Petition at 14.

B. The Rule Was Adopted On Adequate Public Notice.

The Commission should dismiss NYNEX's risible contention that the *Notice* in this proceeding did not provide adequate notice for the adoption of this rule. The legal standard under the Administrative Procedure Act is clear: "It is well established that the exact result reached after a notice and comment rulemaking need not be set out in the initial notice for the notice to be sufficient. Rather, the final rule must be 'a logical outgrowth' of the rule proposed." 12/

The *Notice* set forth a large number of potential actions regarding the transport interconnection charge, and requested comment on each of these alternatives as well as combinations of the alternatives. 13/ A number of parties -- including WorldCom (parent of MFS) and Teleport, the two largest competitive carriers operating in NYNEX's region -- understood the *Notice* as encompassing the rule that the Commission ultimately adopted, and argued for the same or similar remedies. 14/ The transport interconnection rule at issue here was certainly a "logical outgrowth" of the *Notice* in this proceeding.

12/ *Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (1990) (emphasis added). "To avoid 'the absurdity that . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary' . . . final rules need only be a 'logical outgrowth' of the proposed regulations." *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991). See also *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991); *Spartan Broadcasting Co. v. FCC*, 619 F.2d 314, 321-22 (4th Cir. 1980); *California Citizens Band Assoc. v. United States*, 375 F.2d 43, 48 (9th Cir. 1967).

13/ *Notice*, ¶¶ 97-99.

14/ WorldCom Initial Comments, *Access Charge Reform*, CC Docket No. 96-262, at 61-62, 65 (filed Jan. 29, 1997); Teleport Communications Group Initial Comments, *Access Charge Reform*, CC Docket No. 96-262, at 32-33 (filed Jan. 29,

II. NEITHER NYNEX NOR ANY OTHER ILEC IS LIKELY TO SUFFER LEGALLY COGNIZABLE HARM IN THE ABSENCE OF A STAY.

NYNEX advances only two types of "irreparable harm" that it claims it will experience in the absence of a stay -- loss of residual transport interconnection charge revenues, and shift of customers to NYNEX's competitors. But neither of these alleged harms is irreparable, nor are they cognizable for purposes of considering a stay. It is axiomatic that a mere monetary loss does not constitute an "irreparable harm" for stay purposes. ^{15/} And the basis for NYNEX's claimed monetary loss can be ascribed primarily to the operation of the price cap system, specifically the fact that the initial rate of the residual transport interconnection charge will be based on pre-existing demand levels and will not be adjusted as demand grows or declines. As we demonstrate above, this basic fact of the price cap system is one with which NYNEX and the other large ILECs have been living happily for many years, and one that in most instances benefits them significantly. This cannot seriously be considered an irreparable harm.

Moreover, possible shifts of customers from NYNEX to competitors cannot be considered an irreparable harm. NYNEX has made no specific demonstration regarding either the current extent of competition for the transport component of interstate access, or the pace at which competition is advancing, in

1997). It is worth noting that in the erratum to NYNEX's petition, NYNEX retracts its initial misstatement that this issue was first raised by CompTel and Teleport in a late *ex parte* filing.

^{15/} *Access Charge Reform*, CC Docket No. 96-262, Order, FCC 97-216, ¶¶ 30-32 (released June 18, 1997) (rejecting SBC petition for stay).

this context. Moreover, as discussed above, NYNEX's competitive problems relating to the TIC can be laid at NYNEX's own door -- for establishing and perpetuating a higher than average transport interconnection charge (and generally high access charges). The new TIC rule simply gives NYNEX appropriate competitive incentives to reduce its residual TIC and bring it closer in line with that of other ILECs, or even to reduce this non-cost-based charge to zero if NYNEX feels this is necessary to compete. 16/

III. A STAY WOULD HARM COMPETITIVE CARRIERS AND THEIR CUSTOMERS.

A stay would undermine the basic foundation of the Commission's market based approach to access reform. If a stay were granted, neither prescriptive measures nor significant competitive pressures would be available to move ILEC access rates in the direction of cost. As a result, local competitors would be harmed as discussed above. In addition, long distance carriers would continue to pay excessive access charges. As a result consumers would continue to be saddled with long distance prices that are unreasonably high due to the ILECs' excessive access charges, including in particular the residual TIC.

NYNEX's argument that a stay would not harm other parties is logically flawed. NYNEX asserts that the CAPs have competed successfully with NYNEX in the local transport market despite the fact that NYNEX charges the TIC to the CAPs' transport customers. However, the CAPs might well have competed

16/ *Id.*, ¶ 33.

far more successfully with NYNEX in the absence of the current, anti-competitive application of the TIC to CAP transport customers, which inhibits the broader growth of competition. At this critical juncture, when broad-based availability of choices for local telephone service and full-service plans is still only a fervent hope, any significant false moves could irreparably damage the development of competition. Significantly, NYNEX provides no record information regarding the extent of competition for local transport service. And of course one can only speculate what might develop in the future. There is simply no foundation for NYNEX's claim that elimination of the TIC rule would not adversely affect local competitors or consumers.

IV. A STAY WOULD IMPEDE THE PUBLIC INTEREST BY INTERFERING WITH ACCESS COMPETITION.

As discussed above, the new rule regarding the assessment of the residual transport interconnection charge properly creates market pressures for that charge to be reduced. This is consistent with the "market based" approach to access reform that the Commission adopted, which WorldCom (and supposedly NYNEX) supports. Contrary to NYNEX's argument, the rule does not create an uneconomic pricing structure or "distortions in the marketplace." ^{17/} Rather, the rule remedies distortions in the existing uneconomic pricing structure and places competition on a more reasonable basis. The rule promotes competition and cost-based access charges, and should be retained.

^{17/} NYNEX Petition at 24.

More fundamentally, the TIC rule is consistent with the overall vision of access reform and local competition which WorldCom has advocated, and which the Commission largely has adopted. In this vision, no ILEC revenue stream should be shielded from competition; this would slow the process of moving access rates toward cost, thus harming long distance carriers and consumers, and would create a formidable barrier to entry in local access and exchange markets. The TIC rule, by exposing the uneconomic residual TIC to greater competitive pressure, will strongly discipline the ILECs' access charges and will powerfully advance the Commission's market-driven approach to achieving access reform.

In conclusion, WorldCom has demonstrated that NYNEX's petition meets none of the criteria for a stay. The rule that NYNEX seeks to stay will play a powerful role in promoting access competition, and should remain in effect.

Respectfully submitted,

WORLDCOM, INC.

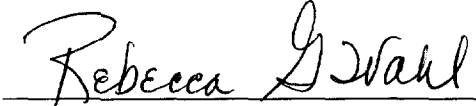
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Dated: August 8, 1997

CERTIFICATE OF SERVICE

I, Rebecca G. Wahl, hereby certify that on this 8th day of August, 1997,
a copy of the foregoing WorldCom, Inc. Comments in Opposition to Nynex Petition
for Stay Pending Judicial Review was hand delivered to the parties listed below.



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